No. 02-661

Supreme Court, U.S.
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In the Supreme Court of the United States

DAIMLERCHRYSLER CORP., *et al.*,
Petitioners,

v.

OFFICIAL COMMITTEE OF ASBESTOS CLAIMANTS OF FEDERAL-MOGUL GLOBAL, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that 28 U.S.C. § 1447(d) deprived it of appellate jurisdiction of the district court's order remanding personal injury claims to the state courts from which they were removed.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-42a) is reported at 300 F.3d 368. The opinion of the district court (Pet. App. 58a-85a) is reported at 282 B.R. 301.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 2002. Pet App. 1a, 45a. The petition for a writ of certiorari was filed on October 29, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

1. A Chapter 11 bankruptcy case involving Federal-Mogul Global and its affiliates ("the Debtors") was filed in the District of Delaware on October 1, 2001. Pet. App. 10a. At the time of filing, the Debtors were co-defendants with

numerous other defendants, including petitioners, in state-court asbestos actions pending throughout the country. When the Debtors filed for bankruptcy, litigation against them was automatically stayed under 11 U.S.C. § 362(a). Many asbestos plaintiffs thereupon severed or dismissed their claims against the Debtors in order to permit their state-court cases against other defendants to go forward. Pet. App. 10a. "This aim was thwarted, however, by a massive campaign by [defendants] of removing claims against them to the local United States District Courts on the theory that these claims were related to" the Debtors' bankruptcy within the meaning of 28 U.S.C. § 1334(b). Pet. App. 60a-61a. The assertion of "related to" subject-matter jurisdiction in the federal courts was premised on allegations that some defendants may have used or installed the Debtors' asbestos-containing brake products, and that, if adjudged liable to plaintiffs, they might have claims for contribution or indemnification against the Debtors at some future time.

On November 20, 2001, petitioners DaimlerChrysler Corporation, Ford Motor Company, and General Motors Corporation (collectively, "the automakers") filed a motion seeking to transfer to the District of Delaware tens of thousands of state-court asbestos claims pending against them nationwide. Pet. App. 61a. Some of these claims had been removed to the local federal district courts, whereas other claims were still pending in state courts. *See* Pet. App. 10a, 53a-55a. The automakers requested that the Delaware District Court immediately issue a provisional transfer order transferring the claims to itself for purposes of determining whether federal subject-matter jurisdiction existed. Pet. App. 11a, 62a. In the wake of the automakers' motion, approximately 30 of the Debtors' other co-defendants filed or joined in motions asking that asbestos suits against them also be transferred to the District of Delaware. *See* Pet. App. 11a.

The Debtors did not join in, or support, these transfer motions.

On November 27, 2001, Chief Judge Becker assigned Judge Alfred Wolin to hold court in the District of Delaware "to complete unfinished business" in the Federal-Mogul bankruptcy and four other major bankruptcies that likewise involve asbestos claims. Pet. App. 47a-48a. On December 10, 2001, Judge Wolin issued an order partially withdrawing the bankruptcy reference in the Federal-Mogul case, *i.e.*, with respect to "Friction Products Claims" as to which "the movants contend that they have a right of indemnification against the [D]ebtors." Pet. App. 49a. He also granted the automakers' *ex parte* motion for a provisional transfer, ordering that claims previously removed to federal district courts "are hereby provisionally transferred to this Court subject to further order of the Court." Pet. App. 50a.

2. On February 8, 2002, Judge Wolin held a hearing on the motions to transfer. After the close of arguments, he issued his oral rulings, which were incorporated in a written order later the same day. *See* Pet. App. 63a, 56a-57a. He first held that the federal district courts lack subject-matter jurisdiction of the provisionally-transferred claims, concluding that state-court tort litigation against the automakers was not "related to" the Debtors' bankruptcy within the meaning of 28 U.S.C. § 1334(b). He accordingly ordered that "the Friction Products Claims are remanded to the state courts from which they were removed pursuant to 28 U.S.C. § 1447." Pet. App. 57a. Section 1447(c), governing procedure after a case is removed from state court, provides: "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."

As an alternative ground, the district court ruled that it would equitably abstain, pursuant to 28 U.S.C. § 1334(c)(1),

from exercising jurisdiction over the Friction Product Claims. Judge Wolin's order does not explicitly recite his oral ruling concerning equitable abstention. However, that holding is presupposed in his order "that, in the alternative, the Friction Products Claims are remanded to the state courts from which they were removed pursuant to 28 U.S.C. § 1452." Pet. App. 57a. Section 1452(b) authorizes the district court to remand a removed claim "on any equitable ground." Having concluded that the federal district courts lack subject-matter jurisdiction, or alternatively that abstention was appropriate, Judge Wolin denied, on a final basis, the motions to transfer that he had previously granted on a provisional basis. Pet. App. 56a. The automakers and other movants immediately noticed appeals from the district court's February 8 order. C.A. App. 1-10.

3. On February 15, 2002, the district court issued its written opinion. Pet. App. 58a-85a. On the issue of subject-matter jurisdiction, the opinion relies principally on the Third Circuit's decision in *Pacor, Inc., v. Higgins*, 743 F.2d 984 (3d Cir. 1984), and on this Court's decision in *Celotex Corp. v. Edwards*, 514 U.S. 300 (1995). *See* Pet. App. 63a-65a. As Judge Wolin observed, this Court in *Celotex* cautioned that "related to" jurisdiction, while broad, "cannot be limitless," and it explicitly approved the jurisdictional analysis set forth in *Pacor*. *See* Pet. App. 67a (quoting *Celotex*, 514 U.S. at 308 & n.6). In *Pacor*, the Third Circuit held that "a mere common-law indemnity claim by a non-debtor co-defendant of a debtor" was not enough to give a bankruptcy court "related to" jurisdiction over litigation between solvent third parties unaffiliated with the debtor. Pet. App. 65a. Such extrinsic litigation, Judge Wolin explained, would be at best "'a mere precursor to the potential third party claim for indemnification by [the indemnitee] against [the debtor],' in which the debtor would be free to relitigate any issue necessary to the prior

judgment." Pet. App. 65a (quoting *Pacor*, 743 F.2d at 995). Thus, not only would an indemnitee's claim against the debtor be "contingent," but any impact on the debtor would be "indirect," since "any material effect on the estate would require yet another lawsuit." Pet. App. 65a.

Judge Wolin noted the Third Circuit's suggestion in *Pacor* that the result there might have been different if the debtor had executed an express contractual agreement to indemnify the third party. Pet. App. 72a (citing *Pacor*, 743 F.2d at 995). Reviewing the judicial precedents since *Pacor*, however, the district court concluded that "cases in which related-to jurisdiction is founded solely on an indemnification agreement between otherwise unrelated parties are not the rule but the exception." Pet. App. 74a-75a. In most of the precedents, the indemnified parties were closely affiliated with the debtor, *e.g.*, its key employees, officers, directors, corporate affiliates, or family members. *See* Pet. App. 70a-72a. Where litigation against corporate insiders is concerned, the court noted that "related to" jurisdiction may be justified not only because the debtor's by-laws grant these individuals indemnification rights, but also because insiders "will typically have incurred the underlying liability in the course of acting on the debtor's behalf." Pet. App. 71a.

Turning to the case at hand, Judge Wolin found: "As to the vast majority of the claims that are the subject of the Court's provisional transfer orders, [petitioners] have produced no evidence whatsoever of even a bare agreement to indemnify running between the [D]ebtors and the solvent co-defendants." Pet. App. 73a. Petitioners Ford and General Motors "rel[ied] only on affidavits of employees that recall one or more of the [D]ebtors as a supplier of brake parts to them," but these affidavits "stop[ped] well short of even suggesting that there was any promise to indemnify." *Ibid.*

In the absence of any agreement to indemnify, the district court could see "no justification to take the situation of these [petitioners] outside of the rule of *Pacor*." *Ibid.*

Judge Wolin believed that "[t]he claims against [appellant] Chrysler present a closer question," because it, unlike the other automakers, had produced documents that allegedly constituted an agreement by the Debtors to indemnify it. Pet. App. 74a. These documents consisted of Chrysler purchase orders, which appeared to incorporate by reference Chrysler office manuals, which in turn set forth "standard terms and conditions to which those purchase orders were subject," including a "boilerplate indemnification clause." Pet. App. 74a, 76a. However, Chrysler produced no evidence that Federal-Mogul had acceded to, or even been shown, this indemnification clause, or that Chrysler had previously sought to enforce it. *See* Pet. App. 74a, 76a. Under these circumstances, the district court rejected the notion "that a manufacturer may write its own invitation to the table of any of its suppliers' bankruptcies by including a boilerplate indemnification clause in its purchase orders." Pet. App. 76a. Judge Wolin noted that this holding was supported by a recent decision of the Fifth Circuit, which denied a stay on substantially identical facts after "finding no likelihood of success in the proposition that Friction Product Claims against [another co-defendant of the Debtors] were related to the Federal-Mogul bankruptcy." Pet. App. 62a-63a, 76a (citing *Arnold v. Garlock*, 278 F.3d 426 (5th Cir. 2001)).

Judge Wolin recognized that his holding as to lack of subject-matter jurisdiction would, by itself, "stand as an adequate ground to deny the transfer motion and remand [the claims] to the state courts from which they were removed." Pet. App. 76a-77a. However, "for the sake of a complete record," the district court also held, "as an alternative,

independent ground" for its judgment, "that it would exercise its discretion to abstain from hearing the [claims] pursuant to 28 U.S.C. § 1334(c)(1)." Pet. App. 77a. The court concluded that "the facts of this case leave no reasonable conclusion other than that [it] should exercise its discretion to abstain," finding that "[f]airness, comity, and preserving the integrity of the Court's management of the bankruptcy compel this result." Pet. App. 78a. Judge Wolin discerned "no principled end to [petitioners'] argument that would prevent centralizing virtually all Friction Product asbestos litigation, nationwide, in this bankruptcy." Pet. App. 79a. He accordingly was "convinced that transfer of [petitioners'] claims would be a disaster for the orderly management of this chapter 11 proceeding." Pet. App. 79a. The court also found that "the possibility that [petitioners] are forum shopping is too obvious to be belabored." Pet. App. 82a.

In exercising his discretion to abstain, Judge Wolin considered petitioners' proposal of a "global" hearing to resolve "common issues of causation and science" under the evidentiary standards of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *See* Pet. App. 80a-82a. Whether such a procedure "would succeed in streamlining the adjudication of claims" was, in the district court's view, "hotly and legitimately debated." Pet. App. 80a. Nor was it clear that such a procedure could "adequately protect the constitutional and procedural rights of the personal injury claimants." *Ibid.* After considering the viability of appellants' proposed "global *Daubert* proceeding" and the harm that delay would inflict on personal injury plaintiffs, Judge Wolin concluded: "Where, as here, the resulting benefit is so equivocal, the balance must tilt sharply toward abstention and remand." Pet. App. 81a.

4. On appeal from the district court's order, appellees (respondents here) were four groups of Friction Products plaintiffs, including the Official Committee of Asbestos Claimants, which was appointed by the U.S. Trustee to represent the interests of asbestos claimants in the Federal-Mogul bankruptcy. *See* Pet. App. 18a.[1] Respondents contended that the appeals should be dismissed for lack of appellate jurisdiction under 28 U.S.C. § 1447(d), which provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." The automakers contended that no valid remand order existed; that they sought review instead of the district court's denial of their transfer motions; that orders denying a change in venue are reviewable either on direct appeal or by way of mandamus; and that the district court's holdings as to subject-matter jurisdiction and abstention should be reversed on the merits. The court of appeals held that it "d[id] not have jurisdiction to review the decisions of the District Court" and that, "insofar as we can consider [petitioners'] appeal construing it as a petition for a writ of mandamus, that petition is denied." Pet. App. 42a.

The court of appeals did not decide whether the district court's order should be regarded as an order remanding the claims to the state courts or an order denying transfer from the federal district courts. Instead, the court stated that it would "follow the prudent course and consider [its] jurisdiction under each construction." Pet. App. 19a.

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[1] Two other groups of respondents – the Unofficial Committee of Select Asbestos Claimants and the Waters & Kraus Claimants – appeared in the district court and the court of appeals to advance additional arguments concerning abstention and jurisdiction. Neither court found it necessary to reach these alternative arguments. Both groups join in this brief and respectfully preserve their additional arguments should those arguments later become relevant.

Addressing the "transfer" construction first, the court cited the "well-established rule" that orders granting or denying a change in venue are not immediately appealable, and that "[m]andamus is * * * the appropriate mechanism for reviewing an allegedly improper transfer order." Pet. App. 19a-20a (citing *In re United States*, 273 F.3d 380, 385 (3d Cir. 2001)). The basis for Judge Wolin's denial of transfer, the court noted, was his holding that "related to" jurisdiction under 28 U.S.C. § 1334(b) did not exist. The Third Circuit concluded that this holding represented a straightforward application of its precedent in *Pacor*, which "clearly remains good law in this circuit." Pet. App. 24a. Noting that mandamus may issue only if "the district court committed a clear error of law at least approaching the magnitude of an unauthorized exercise of judicial power," the court of appeals had no difficulty concluding that the automakers "ha[d] not met this rigorous standard for the issuance of the extraordinary writ of mandamus." Pet. App. 30a (original quotation marks omitted).

Viewing Judge Wolin's order as one remanding the claims to state courts, the Third Circuit held that appellate review of any kind was barred by 28 U.S.C. § 1447(d). In support of this holding, the court relied chiefly on this Court's opinion in *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995), which "clarified the scope of the prohibition of review of remand orders imposed by § 1447(d)." Pet. App. 34a. This Court there held that, "[a]s long as a district court's remand is based on a timely raised defect in removal procedure or on lack of subject-matter jurisdiction – the grounds for remand recognized by § 1447(c) – a court of appeals lacks jurisdiction to entertain an appeal of the remand order under § 1447(d)." 516 U.S. at 127-128 (quoted in Pet. App. 34a). The Third Circuit accordingly concluded that *Things Remembered* dictated the outcome here: "As the basis

for the District Court's remand in this case was lack of subject matter jurisdiction (the absence of 'related to' jurisdiction), appeal is similarly barred." Pet. App. 34a. Finally, emphasizing that the statutory language bars review of remand orders "on appeal or otherwise," the Third Circuit held itself without jurisdiction to grant mandamus, holding that § 1447(d) applies regardless "whether review is sought by appeal or by extraordinary writ." Pet. App. 37a (citations omitted).

5. On August 1, 2002, the Third Circuit unanimously denied petitioners' motion for recall of the mandate and for a stay pending the filing of a petition for writ of certiorari. Pet. App. 46a. On August 2, 2002, petitioners applied to Justice Souter for a stay, who denied the application on August 5. That same day, petitioners renewed their application for a stay, asking that it be presented to Justice Kennedy. On August 7, the Court unanimously denied petitioners' stay application, which Justice Kennedy had referred to the Court.

ARGUMENT

The decision below is correct. Contrary to petitioners' assertion, there is no conflict among the circuits on the question presented, and there is no conflict with any decision of this Court. Indeed, the Third Circuit's decision is fully in accord with this Court's opinion in *Things Remembered*, which squarely forecloses appellate review of the district court's remand orders.

1.a. Petitioners removed the claims at issue from the state courts pursuant to 28 U.S.C. § 1452(a), the bankruptcy removal statute. That section permits removal if the federal district court "has jurisdiction of such claim or cause of action under section 1334." Section 1447 governs "procedure after removal generally." Section 1447(c) provides: "If at any time

before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." Subsection (d) in turn provides: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise," with an exception for certain civil rights cases removed under § 1443.

The bar against appellate review set forth in § 1447(d) "expresses a long respected policy of Congress, which had its origins in the Judiciary Act of 1887." *Application of Rosenthal-Block China Corp.*, 278 F.2d 713, 714 (2d Cir. 1960). This policy is designed to prevent "interrup[tion] of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed." *United States v. Rice*, 327 U.S. 742, 751 (1946). Recognizing that removal and appeal of remand orders "may be designed to achieve little more than a self-help continuance," Congress has determined that remands are to be effective immediately so that state trial courts can return to work. *Hernandez v. Brakegate, Ltd.*, 942 F.2d 1223, 1226 (7th Cir. 1991).

This Court held in *Things Remembered* that the bar against appellate review set forth in § 1447(d) means exactly what it says. There, the respondent had sued the petitioner on commercial claims in Ohio state court. Petitioner later filed for bankruptcy in the Southern District of New York. Respondent then filed a notice of removal seeking to remove the state-court action to Ohio federal district court, coupled with a motion to transfer venue to the New York bankruptcy court. 516 U.S. at 125-26. The district court held the removal untimely and effectively remanded the case to the Ohio state court. *See id.* at 127 n.2 & 128. Petitioner appealed to the Sixth Circuit, which held that § 1447(d)

barred appellate review and dismissed the appeal for lack of jurisdiction.

This Court affirmed. It noted that "§ 1447(d) must be read *in pari materia* with § 1447(c), so that only remands based on grounds specified in § 1447(c) are immune from review under § 1447(d)." 516 U.S. at 127. Section 1447(c) specifies two such grounds: a defect in removal procedure or a lack of subject-matter jurisdiction. The Court accordingly ruled (516 U.S. at 127-28):

> As long as the district court's remand is based on a timely raised defect in removal procedure or on a lack of subject-matter jurisdiction — the grounds for remand recognized by § 1447(c) — a court of appeals lacks jurisdiction to entertain an appeal of the remand order under § 1447(d).

The Court in its opinion also clarified the relationship between § 1447(d) and § 1452(b), the remand provision of the bankruptcy removal statute, which limits the scope of remand, and appellate review of remand orders, in somewhat different terms. Prior to 1995, some courts had held that, where a claim was removed pursuant to the bankruptcy removal statute, judicial review of any remand order was governed exclusively by § 1452(b), so that the absolute bar against appellate review contained in § 1447(d) did not apply. This Court explicitly rejected the rationale of these cases, holding:

> If an order remands a bankruptcy case to state court because of a timely raised defect in removal procedure or lack of subject-matter jurisdiction, then a court of appeals lacks jurisdiction to review that order under § 1447(d), regardless of whether the case was removed under § 1441(a) or § 1452(a).

516 U.S. at 129.

Here, Judge Wolin held that the federal district courts "lack subject matter jurisdiction over the Friction Products Claims," and he accordingly "remanded [those claims] to the state courts from which they were removed pursuant to 28 U.S.C. § 1447." Pet. App. 57a. Lack of subject-matter jurisdiction is one of the two grounds for remand specifically enumerated in § 1447(c). Thus, under the plain language of § 1447(d), the district court's order "is not reviewable on appeal or otherwise." That appellants removed the claims under § 1452(a), as opposed to § 1441(a), does not affect this conclusion, as this Court in *Things Remembered* expressly held.[2]

b. Petitioners acknowledge "the general rule that remand orders are unappealable." Pet. 17. However, they challenge the decision below by citing an exception to this rule recognized in *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), under which the bar against appellate review does not apply to remand orders in excess of the district court's statutory authority. Petitioners contend that the district court here exceeded its authority by remanding the claims directly to state courts, not only in Delaware, but also in other States. The court of appeals rejected petitioners' assertion that § 1447(c) does not authorize such "cross-jurisdictional remands," citing Third Circuit precedent and a

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[2] Consistently with this Court's opinion in *Things Remembered*, the courts of appeals have uniformly held that an order remanding a case to the state court from which it was removed is immune from judicial review under § 1447(d), regardless whether the case was originally removed under § 1441(a) or § 1452(a). *See, e.g., Spring City Corp. v. American Bldgs. Co.*, 193 F.3d 165, 169-70 (3d Cir. 1999); *State of Rio de Janeiro v. Philip Morris Inc.*, 239 F.3d 714, 715 (5th Cir. 2001); *In re Ford Motor Co./Citibank (South Dakota), NA*, 264 F.3d 952, 964 (9th Cir. 2001); *Phoenix Container, L.P. v. Sokoloff*, 235 F.3d 352, 354 (7th Cir. 2000); *Pierpoint v. Barnes*, 94 F.3d 813, 819 n.3, 820 (2d Cir. 1996).

recent decision of the D.C. Circuit. *See* Pet. App. 34a-36a (citing *Republic of Venezuela v. Philip Morris, Inc.*, 287 F.3d 192 (D.C. Cir. 2002)). Petitioners contend that this holding was erroneous. *See* Pet. 21-24. They also allege a circuit conflict on this question, citing an unpublished opinion of the Ninth Circuit. *See* Pet. 21-22.

Both contentions are wrong. There is nothing in the language of § 1447 to support petitioners' assertion that a valid remand can be ordered only by the district court to which the claim was initially removed (or, phrased differently, that a transferee court cannot remand a claim directly to a state court in another State). Section 1447(c) provides simply that, "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." The statute does not specify or limit which court may issue a remand order; rather, it contemplates that the remand will be ordered by whatever district court makes the determination that federal subject-matter jurisdiction is lacking. Here, as a result of the provisional transfers that petitioners themselves sought, that jurisdictional determination was made by the Delaware District Court. Section 1447(c) thus authorized – indeed, by use of the verb "shall," it required – the Delaware District Court to remand the claims.[3]

Tellingly, petitioners' discussion of this issue (Pet. 21-24) completely sidesteps § 1447 and focuses instead on § 1452,

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[3] Section 1447(d) does impose one restriction on the district court's authority: for the bar on appellate review to apply, the order must be one "remanding a case to the State court *from which it was removed.*" That requirement was plainly satisfied here: Judge Wolin's order explicitly remanded the claims "to the state courts from which they were removed pursuant to 28 U.S.C. § 1447." Pet. App. 57a; *see id.* 94a-96a (remand order dated August 6, 2002).

the bankruptcy removal statute. The remand provisions of § 1452 differ from those of § 1447 in four respects:

- § 1452(b) authorizes remand on "any equitable ground," whereas § 1447(c) authorizes remand on two specified legal grounds (lack of subject-matter jurisdiction or defect in removal procedure);
- § 1452(b) authorizes remand by "[t]he court to which such claim or cause of action is removed," whereas § 1447(c) refers simply to "the district court";
- § 1452(b) makes remand permissive ("may remand"), whereas § 1447(c) makes it mandatory ("the case shall be remanded"); and
- § 1452(b) makes remand orders non-reviewable "by the court of appeals under section 158(d), 1291, or 1292 of this title," whereas § 1447(d) states categorically that a § 1447(c) remand order "is not reviewable on appeal or otherwise," with no limitation apart from specified civil rights cases.

In contending that the district court's "cross-jurisdictional remand" exceeded its statutory authority, petitioners argue that the District of Delaware, as the transferee court, was not "[t]he court to which such claim or cause of action [was] removed" for purposes of § 1452(b). *See* Pet. 21-23. But § 1452(b) has no bearing here: having determined that subject-matter jurisdiction was lacking, Judge Wolin based his remand on § 1447(c), which explicitly states that if "the district lacks subject matter jurisdiction, the case shall be remanded." *See* Pet. App. 57a (citing 28 U.S.C. § 1447). Indeed, because lack of subject-matter jurisdiction is a legal, not an equitable, ground, Judge Wolin necessarily based his

remand on § 1447(c). He cited § 1452(b) as an "alternative" basis for remand, which would follow as a consequence of his alternative holding concerning equitable abstention. *See* Pet. App. 57a, 77a. The court of appeals had no occasion to reach that alternative holding. *See* Pet. App. 19a. Thus, no question as to the proper construction of § 1452(b) is raised here, and petitioners' reliance on that provision is wholly misplaced.

For similar reasons, there is no basis for petitioners' assertion of a conflict between the opinion below and the Ninth Circuit's unpublished opinion in *In re U.S. Refining & Mktg. Co. (Hudson-Ram L.P. v. Archer)*, 210 F.2d 387 (table), 2000 WL 14398 (9th Cir. Jan. 7, 2000) (unpublished). The remand order in that case was entered under § 1452(b), and the Ninth Circuit reversed on the ground that the district court which ordered the remand was not "[t]he court to which [the] claim or cause of action [had been] removed" within the meaning of § 1452(b). Because the Ninth Circuit had no occasion to address, and did not address, § 1447(d), its decision does not conflict with the decision below. Conversely, as petitioners admit (Pet. 22-23), both the Third Circuit and the D.C. Circuit have held that § 1447(d) bars appellate review of a remand order regardless whether it is "cross-jurisdictional" in nature, and no court has held to the contrary.

Equally important, the Ninth Circuit opinion on which petitioners rely was unpublished. Under that court's rules, unpublished decisions may not be cited as precedent (except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel). *See* CTA9 Rule 36-3. Thus, the Ninth Circuit's unpublished decision could not create a "conflict" requiring resolution by this Court, even if its

decision were inconsistent with the Third Circuit's decision, which it is not.

Finally, there is no conflict between the Third Circuit's decision and any decision of this Court. Quite the contrary: it is petitioners who, by urging reversal, seek to contravene this Court's decisions. Because the text of § 1447(d) is hopelessly against them, petitioners in effect urge that § 1452(b) should be the exclusive provision controlling remand orders in bankruptcy cases. *See* Pet. 22-23. As noted above, this Court in *Things Remembered* explicitly rejected that proposition. *See* 516 U.S. at 129 (finding "no express indication in § 1452 that Congress intended that statute to be the exclusive provision governing removals and remands in bankruptcy" nor "any reason to infer from § 1447(d) that Congress intended to exclude bankruptcy cases from its coverage").[4]

2. Petitioners also ask this Court to review the Third Circuit's ruling that it would lack jurisdiction to review the district court's order if that order were considered, in the alternative, as a denial of motions to transfer. *See* Pet. 14-17.

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[4] Petitioners also ask this Court to review the Third Circuit's supposed conclusion that a remand order premised on lack of subject-matter jurisdiction would be non-reviewable *even if* the order exceeded the district court's statutory authority. *See* Pet. 17-21. Since the court of appeals expressly held that Judge Wolin's remand order was *within* his statutory authority (Pet. App. 34a-36a), the question petitioners posit is entirely hypothetical here, and their allegation of a circuit conflict on this point (Pet. 20-21) is thus completely meritless. In any event, contrary to petitioners' assertion (Pet. 19), the Third Circuit did not embrace an "untenably overbroad" interpretation of *Things Remembered*. In the passage to which petitioners refer (Pet. App. 34a), the court of appeals recites this Court's holding in that case, quotes a key sentence from the Court's opinion, and applies it in a straightforward manner to this case. Nothing in the court of appeals' discussion suggests the "negative pregnant" that petitioners would inject into it.

Petitioners do not contest the unavailability of mandamus, since the district court's decision that it lacked subject-matter jurisdiction was firmly grounded on Third Circuit precedent. However, petitioners contend that the court of appeals erred in holding them to a mandamus standard, asserting that the denial of a motion for change of venue is immediately appealable – at least in bankruptcy cases – either as a "final decision" under 28 U.S.C. § 1291 or under the "collateral order doctrine" of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Petitioners contend that the Third Circuit's decision conflicts, in this respect, with the Sixth Circuit's decision in *In re Dow Corning Corp.*, 86 F.3d 482 (6th Cir. 1996).

a. The question whether the denial of a motion for change of venue is subject to direct appeal is not properly presented here. Petitioners below were plainly not aggrieved by Judge Wolin's handling of the "transfer" issue. He granted a provisional transfer, as they requested, and he decided the issue of subject-matter jurisdiction on a uniform, global basis, as they asked. In a procedural sense, therefore, petitioners got exactly what they wanted in the district court. At the appellate level, the issue of "transfer" was completely irrelevant: no one before the court of appeals disputed the propriety of the provisional transfer, and that issue was effectively moot. It no longer presented a justiciable case or controversy.

Under these circumstances, petitioners' assertion that they are merely seeking review of the ultimate denial of their transfer motions is a subterfuge designed to evade Congress's clearly-stated bar against appellate review of remand orders. Judge Wolin squarely held that the federal district courts lacked subject-matter jurisdiction of the claims against petitioners and, as § 1447(c) requires, he accordingly

"ordered that [those] claims are remanded to the state courts from which they were removed." Pet. App. 57a. In consequence of that holding, there remained no legal issue for the federal courts to decide, and disposition of the pending motions to transfer, which the district court had provisionally granted, became a mere matter of housekeeping. It was immaterial whether Judge Wolin denied the transfer motions; vacated his order allowing the provisional transfer; or simply left the transfer motions in abeyance as moot. Any of these actions would have been entirely *pro forma*.

The district court's ultimate denial of transfer, in short, was simply the logical consequence of its determination that it lacked subject-matter jurisdiction; it was not a substantive holding with independent significance apart from the remand order. Petitioners' appellate briefs advanced no argument concerning the propriety of "transfer" per se. And petitioners plainly did not desire the relief that would flow from mere reversal of the denial of their motions to transfer. That would simply restore the *status quo ante*: the claims would be in Judge Wolin's court, as they were following the provisional transfer. But Judge Wolin had already made clear what he would do with the claims – he would remand them to the state courts for lack of subject-matter jurisdiction. The relief petitioners sought from the court of appeals, obviously, was reversal of Judge Wolin's jurisdictional determination and remand order. But those are precisely the issues that

Congress, in enacting § 1447(d), has made non-reviewable "on appeal or otherwise."[5]

For these reasons, the district court's *pro forma* denial of petitioners' motions to transfer does not furnish an independent ground for appellate jurisdiction that would enable petitioners to evade the § 1447(d) bar on appellate review of remand orders. Indeed, in *Things Remembered*, this Court held that § 1447(d) barred appellate review even though the district court had concurrently denied a motion to transfer. The respondent there had filed a notice of removal in Ohio bankruptcy court and a motion to transfer to New York bankruptcy court. The Ohio bankruptcy court concluded that removal was proper and granted the motion to transfer; the district court reversed. *See* 516 U.S. at 126-27. The

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[5] When a district court has remanded claims to state court for lack of subject-matter jurisdiction, and has also decided a separate and independent issue — *e.g.*, dismissal of a cross-claim or the propriety of substituting parties — an appellate court may have jurisdiction to review the *latter issue*. *See City of Waco, Tex. v. United States Fid. & Guar. Co.*, 293 U.S. 140, 143 (1934); *Aliota v. Graham*, 984 F.2d 1350, 1353 (3d Cir. 1993). Appellate review is permitted, however, only where the other issue is "'in logic and in fact' severable from the court's determinations regarding remand." *Nutter v. Monongahela Power Co.*, 4 F.3d 319, 321, 323 (4th Cir. 1993); *see Aliota*, 984 F.2d at 1353 (§ 1447(d) bars review of any issue "inextricably linked to the question of remand"); *Ariail Drug Co. v. Recomm Int'l Display, Inc.*, 122 F.3d 930, 934 (11th Cir. 1997) (review unavailable unless issue is "separate and independent" from determination of subject-matter jurisdiction); *Clorox Co. v. United States District Court*, 779 F.2d 517, 520 (9th Cir. 1985) (review unavailable unless district court has decided "some matter of substantive law 'apart from any jurisdictional decision'"). Here, the district court's denial of petitioners' transfer motions did not involve any discrete issue of substantive law, much less an issue that was "independent of" or "severable from" his jurisdictional holding and remand order. Quite the contrary: Judge Wolin's denial of the transfer motions was the direct consequence of his holding that he lacked subject-matter jurisdiction and was thus "inextricably linked" to his remand order. *Aliota*, 984 F.2d at 1353.

Sixth Circuit and this Court both held that appellate jurisdiction was barred by § 1447(d), notwithstanding that a motion to transfer had been filed, granted, and reversed. This Court's holding in *Things Remembered* thus makes clear that the additional question petitioners seek to present – whether the denial of a motion for change in venue is subject to direct appeal – is not properly presented here, because on the facts of this case it is inseparable from, and a mere proxy for, the question whether the district court's remand order is subject to appellate review.

b. Even if the question whether the denial of a motion for change of venue is reviewable on direct appeal were properly presented here, there is no conflict among the circuits requiring this Court's review. Petitioners assert a conflict with *Dow Corning*, where the Sixth Circuit entertained an appeal from the denial of a transfer motion. While recognizing that motions for change of venue generally do not constitute "final decisions of the district courts" within the meaning of 28 U.S.C. § 1291, the Sixth Circuit cited what it called "a more relaxed rule of appealability in bankruptcy cases" to justify "appellate review of orders that in other contexts might be considered interlocutory." 86 F.3d at 488.

Putting aside questions as to the correctness of the Sixth Circuit's ruling, *Dow Corning* differs from the instant case in a critical respect: in *Dow Corning*, the district court had not entered an order under § 1447(c) remanding the claims at issue to the state courts. The district court in *Dow Corning* did not mention § 1447(c) in its opinion, and it specifically declined to issue a remand order. Rather, it stated that any "orders to dismiss or sever the Debtor and/or remanding the claims to the state court should be addressed by the district court where those causes of action are currently pending." 187 B.R. 934, 938 (E.D. Mich. 1995). The Sixth Circuit in its opinion specifically noted the limited nature of the district

court's action. *See* 86 F.3d at 487 ("In denying the transfer motions, the district court also directed that individual federal courts nationwide dismiss or sever Dow Corning and/or remand the [claims at issue] to state court.").

By its terms, § 1447(d) bars appellate review only where a district court has issued "[a]n order remanding a case to the State court from which it was removed." No such order existed in *Dow Corning*, and the Sixth Circuit's opinion does not suggest that appellees advanced a § 1447(d) argument in their briefs. However, shortly after the principal appellate briefs were filed, this Court issued its opinion in *Things Remembered*. The Sixth Circuit then issued, *sua sponte*, an order directing counsel to address at oral argument "what application, if any, the Supreme Court's decision in *Things Remembered* * * * has to these appeals." Order dated Feb. 23, 1996 (unpublished). After hearing argument, the Sixth Circuit was satisfied that the district court had not issued a remand order that would call into play the § 1447(d) bar on appellate review. Accordingly, the Sixth Circuit's opinion deals only with the "final decision" requirement of § 1291; it does not mention § 1447(d) anywhere in its opinion.

The Sixth Circuit's decision in *Dow Corning* would conflict with the decision below only if it could be said with certainty that the Sixth Circuit would allow an immediate appeal of the denial of a transfer motion, notwithstanding that the district court had issued an order under § 1447(c) remanding the claims to the state courts. Since no remand order existed in *Dow Corning*, and since the Sixth Circuit consequently did not address § 1447(d) in its opinion, there is no plausible basis for such a prediction. Quite the contrary: by directing counsel to discuss the possible application of *Things Remembered* to the *Dow Corning* appeals, the Sixth Circuit made it plain that the existence of a § 1447(c) remand order, such as Judge Wolin issued here, would have altered

its jurisdictional analysis considerably. For these reasons, there is no conflict between *Dow Corning* and the Third Circuit's decision in this case.[6]

3. Finally, this case is not invested with such importance as to warrant the grant of certiorari in the absence of a circuit conflict. Contrary to petitioners' assertion, the question raised here is not "whether the American judicial system can address the exploding national asbestos litigation crisis with even a modicum of fairness and rationality." Pet. 1. This case presents a straightforward question of appellate jurisdiction, which could arise in any bankruptcy case. And the question is not novel. This Court recently addressed the very same question of appellate jurisdiction in *Things Remembered*, and its resolution of that question controls the outcome here.

According to petitioners, this case is important because it presents an opportunity for determining "whether the expert opinions underlying the friction-product claims pass scientific muster under *Daubert v. Merrell Dow Pharmaceuticals*." Pet. 1. One may accept *arguendo* petitioners' assertion that the possibility of resolving common issues of causation and science through a *Daubert* summary-judgment proceeding is "an immensely important legal issue" in the context of asbestos bankruptcies. Pet. 3. The short answer, however, is that such proceedings can be conducted, if the courts deem them useful, without petitioners' being present. At least a dozen major asbestos bankruptcies are currently pending in

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[6] For the same reasons, petitioners err (Pet. 16) in alleging a conflict between the decision below and the Fourth Circuit's decision in *A.H.Robins Co., Inc.. v. Piccinnin*, 788 F.2d 994 (1986). That court entertained an immediate appeal from an order *granting* a motion to transfer. By definition, therefore, a § 1447(c) remand order did not exist, and could not possibly have existed in that case, and the § 1447(d) bar against appellate review was similarly inapplicable.

various district courts, and some form of "global *Daubert* proceeding" is being urged by several of those debtors as a mechanism for resolving asbestos claims. Indeed, there is nothing to prevent Judge Wolin from conducting a "global *Daubert* proceeding" in this very case – the Debtors currently have more than 300,000 friction-product asbestos claims pending against them – if such a proceeding were sought by the Debtors and if Judge Wolin were persuaded to put aside the reservations he has thus far expressed.[7]

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[7] Although petitioners believe that a global *Daubert* hearing holds the promise of resolving "thousands of asbestos friction-product claims in one fell swoop" (Pet. 24), Judge Wolin noted that this proposition "is hotly and legitimately debated." Pet. App. 80a. This Court's opinion in *Daubert*, and its subsequent opinion in *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999), make it clear that the admissibility of scientific evidence is determined on a case-by-case, rather than a global, basis. *See* 509 U.S. at 592-93; 526 U.S. at 153-57. As Judge Wolin observed, "[d]epending on what the scientific evidence shows, it may well appear that causation issues are not sufficiently common between litigants to permit Rule 42 trials." Pet. App. 80a. Judge Wolin's observation comports with this Court's discussion of Rule 23 commonality in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), and *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). Moreover, every state has either adopted *Daubert* or has otherwise established a standard for excluding unreliable scientific evidence, yet petitioners offer no explanation why asbestos defendants, over the past decade, have been unable to convince federal and state courts to exclude plaintiffs' scientific evidence across the board and dismiss their claims as a matter of law. In fact, petitioners' trust in a "one fell swoop" resolution under *Daubert* flies in the face of *State ex rel. Mobil Corp. v. Gaughan*, 563 S.E.2d 419 (W. Va. 2002), *cert. denied*, 123 S.Ct. 346 (No. 02-132, Oct. 7, 2002). There, consolidation of a large number of asbestos personal injury claims in a jurisdiction that applies *Daubert* standards (*see Wilt v. Buracker*, 443 S.E.2d 196 (W.Va. 1993)) made possible the sort of proceedings that petitioners favor. But that case did not give rise to any form of *Daubert* summary-judgment proceeding – whether "global" or keyed to specific products or defenses – but rather to a petition for certiorari by defendants arguing that consolidation of so many claims prejudiced their defense. In this respect, the instant case is indistinguishable from the West Virginia case, and it is difficult to

If a *Daubert* summary-judgment procedure actually represents the panacea for bankruptcy practice and asbestos litigation that petitioners imagine, the viability of that procedure can be tested by numerous district courts in numerous bankruptcies, on the basis of asbestos claims over which they indisputably have jurisdiction. There is simply no justification for warping well-established principles of subject-matter jurisdiction, not to mention appellate jurisdiction, so as to enable the automakers to hijack somebody else's bankruptcy.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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understand what legitimate bases petitioners might have to believe that they would be more successful in getting tens of thousands of asbestos claims dismissed "in one fell swoop" in the Delaware District Court.

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